Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-338

MARIO ORTIZ SERVANTES,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

The Petitioner, MARIO ORTIZ SERVANTES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 5, 1975.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit on original submission of the cause appears in the appendix hereof.

JURISDICTION

The judgment of the United States Court of

Appeals for the Fifth Circuit was entered and delivered on August 5, 1975. This Petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED

Whether the search forming the basis of Appellant's conviction was not a border search or a functional equivalent thereof and was conducted without probable cause and should be made retroactive.

STATEMENT OF THE CASE

The Appellant, MARIO ORTIZ SERVANTES, was charged with the offense of possession of marihuana with intent to distribute in violation of Title 21 USC, Section 841 (A) (1).

To said count, Defendant plead not guilty, filed and urged his Motion to Suppress Evidence by reason of an unlawful search and seizure. The Motion to Suppress was denied by the trial court. Later, the Appellant was tried by a jury and found guilty.

The Appellant appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the trial court's actions.

Facts indicate that the Appellant was the driver of a vehicle that was stopped at the Falfurrias, Texas Border Patrol checkpoint. Said checkpoint is located approximately 75 miles North of the Mexican border. The date that this Appellant was stopped was May 30, 1973. At that

time, the Appellant driver was ordered to open his auto's trunk by a border patrol agent at the Falfurrias checkpoint which exposed a quantity of marihuana which was introduced as evidence at the Appellant's trial. The search was supported by neither probable cause nor a search warrant but the trial court denied the Appellant's Motion to Suppress on the grounds that the search was justified as a border search. It should be noted that none of the marihuana was in view at the time of the search.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because there should be no court holding whereby a person is guilty as of one date but not guilty as of another date. The date in question being that of Almeida-Sanchez vs. U. S. (413 U. S. 266) (1973). It should be noted that the basis for holding the search unconstitutional in the Almeida-Sanchez case was because of the Fourth Amendment to the United States Constitution. This same amendment has been in existence since this Country's inception and had as its purpose then as well as now to allow people to be secure in their homes without the fear of unreasonable searches and seizures. This right is not new to Americans but has been available to all Americans since this Country was founded. There is still the necessity of probable cause that is set out in the Fourth Amendment and must be adhered to.

It should be noted, that under the exclusionary rule as propounded by the Fourth Amendment, it has always been determined that evidence that has been illegally obtained would be inadmissible and suppressed. Further, the right of privacy

has remained secure without worry of unreasonable search and seizure but will be severely impaired if in fact certiorari is not granted in this case.

As is indicated, the fact situation is such that we see the Appellant stopped at a border patrol checkpoint at which time lawful immigration status by citizenship was established. However, there was no reason to search the trunk of the vehicle. For authority on this we call the Court's attention to the United States vs. Ortiz (95 S. CT. 2585) (1975) in which Court stated that the Fourth Amendment forbids border patrol officers, in the absence of consent or probable cause, to search privately owned vehicles at the checkpoints removed from the border and its functional equivalents and for this purpose there is no difference between a checkpoint and a roving patrol. This is also substantiated by the case of Almeida-Sanchez vs. United States (413 U.S. 266) (1973).

Further, to deny this Appellant his Fourth Amendment rights merely because he was approximately twenty-three (23) days prior to the holding of the Almeida-Sanchez decision, denies this Appellant his fundamental Fourth Amendment rights which are given to him as well as his rights under the Due Process and Equal Protection of the laws portions of our constitution which all have as their basic purpose "fundamental fairness."

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

DATED: AUGUST 31, 1975

Respectfully submitted,

Ronald D. Zipp per mas.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 1975, two copies of the petition for writ of certiorari were mailed, postage prepaid to the Honorable James R. Gough, Assistant United States Attorney, P. O. box 61129, Houston, Texas 77061, and Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

Ronald D. Zipp pursuant

RONALD D. ZIPP

COUNSEL FOR PETITIONER

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-4193
Summary Calandar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

MARIO ORTIZ SERVANTES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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August 5, 1975

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

PER CURIAM: AFFIRMED. See Local Rule 21. [1]

This pre-Almeida-Sanchez [2] case involving the Falfurrias checkpoint is affirmed pursuant to the United States Supreme Court decisions in United States v. Peltier, 422 U.S. __, 43 L.W. 4918 (June 25, 1975) and Bowen v. United States, 422 U.S. __, 43 L.W. 5024 (June 30, 1975).

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

2/ Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing approximately 366 pounds of marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of three years' imprisonment to be followed by a special parole term of three years. The court of appeals affirmed *per curiam* (Pet. App.).

The evidence showed that a vehicle driven by petitioner was stopped at a fixed immigration checkpoint near Falfurrias, Texas, on May 30, 1973. While questioning the occupants of the vehicle as to their citizenship,[1] a Border Patrol officer detected the odor of marihuana and asked petitioner to open the trunk of the vehicle. Petitioner opened the trunk, exposing the marihuana that he was convicted of possessing.

Petitioner contends that this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which invalidated a warrantless "roving patrol" search of an automobile for concealed aliens, conducted without probable cause to believe that the vehicle contained aliens—should be applied retroactively to invalidate the search of his vehicle by the Border Patrol officers at a fixed immigration checkpoint. The search of petitioner's vehicle, however, occurred after the officer had detected the odor of marihuana. The search was therefore based on probable cause to believe that the vehicle contained contraband (*United States* v. *Blackstock*, 451 F. 2d 908, 910 (C.A. 9)), and the principles enunciated in *Almeida-Sanchez* are not applicable here.

In any event, this Court held in *Bowen* v. *United States*, No. 73-6848, decided June 30, 1975, that *Almeida-Sanchez* should not be applied retroactively

[1] Petitioner's co-defendant Cindy Lou Bates was a passenger in the vehicle when it was stopped. She was also charged with illegal possession of marihuana and was tried jointly with petitioner. The jury was unable to reach a verdict as to Bates, and a mistrial was declared as to her.

to require the suppression of evidence seized pursuant to a search of a vehicle at a fixed immigration checkpoint. Since the search of petitioner's vehicle occurred prior to the date of the *Almeida-Sanchez* decision, the court of appeals properly affirmed petitioner's conviction on the authority of *Bowen* (Pet. App. 8).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

[2] Petitioner does not challenge the validity of the initial stop of his vehicle at the checkpoint. In *United States* v. *Martinez-Fuerte*, No. 74-1560, certiorari granted, October 6, 1975, we argue that routine warrantless stops of vehicles at fixed immigration checkpoints, for the purpose of inquiring into the occupants' citizenship and right to be in this country, are reasonable under Fourth Amendment standards. That issue is also presented in *Sifuentes* v. *United States*, No. 75-5387, certiorari granted, November 11, 1975. Both cases involve post-*Almeida-Sanchez* stops. Even if the Court were to decide that such routine stops are unlawful, the decision would not affect the disposition of petitioner's case. From the Court's decision in *Bowen*, holding that the principles of *Almeida-Sanchez* should not be applied retroactively to invalidate *searches* at a fixed checkpoint, it follows *a fortiori* that the validity of the initial stop at a checkpoint, conducted prior to the decision in *Almeida-Sanchez*, is likewise unaffected.

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